STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

RALPH A. KOVNESKY,

Plaintiff,

vs.

JUDGMENT

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, and COUNTY OF MILWAUKEE,

Case No. 157-239

Defendants.

BEFORE: HON. GEORGE R. CURRIE, Reserve Circuit Judge

The above entitled review action having been heard by the Court on the 6th day of February, 1978, at the City-County Building in the city of Madison; and the plaintiff having appeared by Attorney William H. Vettel; and the defendant Department having appeared by Attorney Robert C. Reed; and the Court having had the benefit of the argument and briefs of counsel, and having filed its Memorandum Decision wherein Judgment is directed to be entered as herein provided;

It is Ordered and Adjudged that the Decision of defendant Department of Industry, Labor and Human Relations dated May 16, 1977, entered in the matter of the unemployment benefit claim of Ralph A. Kovnesky, Employee, Appellant, involving the account of County of Milwaukee, Employer, Respondent, be, and the same hereby is, confirmed.

Dated this 23rd day of February, 1978.

By the Court:

George R. Currie

Reserve Circuit Judge

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

RALPH A. KOVNESKY,

Plaintiff,

vs. MEMORANDUM DECISION

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, and COUNTY OF MILWAUKEE, Case No. 157-239

Defendants.

BEFORE: HON. GEORGE R. CURRIE, Reserve Circuit Judge

This is an ation by the plaintiff employee to review a decision of the defendant department dated May 16, 1977, entered in an unemployment compensation proceeding which adopted the findings of fact of the appeal tribunal and affirmed the appeal tribunal's decision. The appeal tribunal's decision determined the employee was ineligible for unemployment compensation during the period of his disciplinary suspension, the details of which were stated in the findings of fact.

The appeal tribunal's findings of fact read:

> "The employe worked for approximately six years as deputy sheriff for the employer, a municipality. His last day of work was May 7, 1976 (week 19), when his employment was suspended pending a discharge hearing.
>
> During the summer of 1975, the employe was present on premises at which he knew intoxicating liquors were being sold in violation of the law. Such premises are commonly referred to as an 'after hours place.' He did not report the operation of this 'after hours place' to his supervisors or to any other law enforcement agency.

Section 176.36 of the statutes provides:

> Every peace officer as defined s. 939.22(22) who knows, or is credibly informed, that any unlawful offense has been committed relating to the sale of intoxicating liquors, shall make complaint against the persons so offending within their respective jurisdiction to a person authorized to issue a criminal warrant, and for every neglect or refusal to do so, every such officer shall be fined not exceeding $50.00 and costs.

Rule 48 of the Milwaukee County Sheriff's Department Rules and Regulations provides:

> Members of the Department shall communicate promptly to the commanding officer all crimes, prisoner escapes, attempted escapes, jail breaks, suicides, attempted suicides, accidents and all important incidents, complaints and information of which the Department takes cognizance and which may come to their attention. Members will submit timely, written incident reports on these occurences, etc.
>
> Rule 77 of the Milwaukee County Sheriff's Department Rules and Regulations provides, in part:
>
> Any member of the Department may be suspended from the service by the Sheriff, pending a hearing before the County Civil Service Commission, when charged with any of the following offenses: . . . Failure to report known violation of law or ordinance.

The employe maintained that he did not report the operation of this 'after hours place' because he had a drink there and he had seen an unmarked police car parked outside so he assumed the police already knew about it. However, his explanation does not excuse his failure to report the operation of such premises. It was his duty both under the statutes and the department work rules to report unlawful offenses relating to the sale of intoxicating liquors. Additionally, he had received two prior disciplinary suspensions for violations of department work rules.

Under the circumstances, the employe's actions in failing to report the operation of premises selling intoxicating liquors in violation of the law, together with his prior disciplinary record, evinced a wilful, intentional and substantial disregard of the employer's interests and of the standards of conduct that the employer had a right to expect of him.

The appeal tribunal therefore finds that the employe received a disciplinary suspension beginning in week 19 of 1976, for misconduct connected with his employment, within the meaning of section 108.04(6)(a) of the statutes."

THE ISSUES

The brief submitted in behalf of the employee raises these two issues:

(1) Whether there is credible evidence to support the findings of misconduct by the employee?

(2) If the Issue (1) is decided adversely to the employee, did the employee's conduct so found constitute "misconduct connected with his employment" within the

meaning of sec. 108.04(6)(a), Stats.?

APPLICABLE STATUTES

Section 108.04(6), Stats., provides in part as follows:

"Disciplinary Suspension. As to an employe's weeks of unemployment by reason of a disciplinary suspension by a given employer, the employe shall be ineligible for benefits as follows:

(a) If the suspension was for misconduct connected with his employment, he shall be ineligible from the given employer's account for each such week and ineligible from other previous employer accounts for the first 3 such weeks."

Section 176.36, Stats., provides:

"Excise laws; enforcement by peace officers; penalty. Every peace officer as defined in s. 939.22(22) who knows, or is credibly informed, that any unlawful offense has been committed relating to the sale of intoxicating liquors, shall make complaint against the person so offending within their respective jurisdictions to a person authorized to issue a criminal warrant, and for every neglect or refusal to do so, every such officer shall be fined not exceeding $50 and costs." (Emphasis added.)

Section 939.22(22), Stats., provides:

"'Peace officer' means any person vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes."

THE COURT'S DECISION

The employee testified: He had visited the "after hours place" on two occasions during the summer of 1975 which was a private residence or apartment. On the first occasion he was drunk and on the second one he was intoxicated. When he is only intoxicated he can remember facts but not when drunk. The second occasion he had tended bar at a Saturday night wedding reception at a tavern and had consumed drinks there. After this tavern closed at 3:30 a.m., on Sunday morning, he went to the "after hours place" by agreement with some people at the wedding reception, including Mr. and Mrs. Wetzel, who also were at the "after hours place" when he was there. He had drinks there but did not pay for them, somebody else did.

The employee, after testifying that someone else paid for

his drinks, was asked these questions and gave these answers (Tr. 44):

"Q All right. Now are you aware of the fact a private residence dispensing liquor for a price is a violation of either State law or a City ordinance?
A The second time I was there, yes; I told you that.
Q So then you were aware of the fact that you were in an establishment that was violating the law; is that correct?
A When I found out, I left.
Q And is that the time that you were a drunk?
A Not the first time, I was drunk. The second time I was intoxicated.
Q So you could remember the facts?
A Yes."

Counsel for the employee contends merely because a sale of intoxicating liquor occurred on the private residence premises does not ~~established~~ that anything illegal took place. The Court disagrees. Either the sale was illegal because the seller did not possess a Retail Class B liquor license as required by secs. 176.04 and 176.05(2), Stats., or, if such a license was possessed, because the sale was made after 3:30 a.m. on a Sunday morning in violation of sec. 176.06(6), Stats.

The employee admitted he did not report this violation until he did so at the John Doe investigation. The actual date of this John Doe investigation before Judge Gram does not appear in the record, but it can be assumed that it was not very long prior to May 6, 1976, the date of the employee's suspension pending the discharge hearing before the Milwaukee County Civil Service Commission. The employee testified the reason he did not report the violation prior to the John Doe proceeding was "because there obviously was surveillance already by some municipality, the squad car was parked right in front of the place [when the employee left it] with officers sitting right there." (Tr. 76).

The employee further testified he was not aware of sec. 176.36, Stats. However, he did not testify at the time of his second visit to the "after hours place" he was not aware of the provisions of Rule 48 of the Milwaukee County Sheriff's Department

Rules and Regulations which requires officers of the department to report promptly to the commanding officer "all crimes." Furthermore, in testifying why he did not report this violation, the employee did not ~~adverse of~~ advance as an excuse that he was not under any duty to do so. The appeal tribunal and the department could reasonably find the employee was familiar with the provisions of Rule 48.

Even though the employee testified he was not aware of sec. 176.36, Stats., Captain Klamm, who is in charge of police services in the sheriff's department, testified that the employee in his indoctrination was told he must uphold this law, but Klamm did not know whether it had been read to the employee.

The findings contain an error in finding that the employee had received two prior disciplinary suspensions. There had been but one prior disciplinary suspension but there had been three prior written reprimands (Exhibit 1, pp. 3 and 4). The Court deems it immaterial whether there had been one or two prior disciplinary suspensions.

With the exception noted, the Court determines that there is credible evidence to sustain all the findings of fact dealing with the alleged misconduct of the employee except the last two paragraphs of the findings of fact. The last two paragraphs of the findings of fact are more in the nature of conclusions of law than true findings of fact, and the correctness thereof will now be considered in resolving the second of the two issues raised by the employee's brief.

Both briefs cite the definition of misconduct for purposes of sec. 108.04(6)(a), Stats., formerly sec. 108.04(5), Stats., set forth in the leading case of Boynton Cab Co. v. Newbeck, 237 Wis. 249, 259, 296 N.W. 636 (1941) as follows:

> ". . . [T]he intended meaning of the term 'misconduct,' as used in sec. 108.04(4)(a), Stats., is limited to conduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of

> standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the statutes."

The employee's brief advances two reasons why the employee's conduct in not reporting the violation of law he observed while at the "after hours place" on his second visit there did not constitute misconduct connected with his employment within the meaning of sec. 108.04(6)(a), Stats.: (1) the employee was off duty at the time; and (2) his intoxicated condition. No issue has been raised as to the reasonableness of Rule 48 of the Sheriff's Department Rules and Regulations, probably because such rule as applicable to the instant fact situation is in accord with the provisions of sec. 176.36, Stats.

The case of Gregory v. Anderson, 14 Wis. 2d 130, 109 N.W. 2d 675 (1961), dealt with the issue of whether a violation of a work rule applicable to off duty conduct would constitute misconduct connected with an employee's employment within the meaning of then sec. 108.04(5), Stats., now 108.04(6)(a), Stats. The decision laid down this test for determining whether such a rule is a reasonable one (p. 137):

> "In order for a violation of a rule laid down by the employer to constitute misconduct under such statute, such rule must be a reasonable one. When such rule relates to conduct of the employee during off-duty hours, it must bear a reasonable relationship to the employer's interests in order to be reasonable."

Here the business of the sheriff's department is law enforcement and Rule 48, in requiring a deputy sheriff while off duty to report to his commanding officer a crime he observes, deals with a matter which bears a reasonable relationship to such business. Therefore, the fact that the employee was off

duty when he observed the law violation occurring at the "after hours place" did not relieve his conduct in failing to report such law violation from constituting misconduct connected with his employment within the meaning of sec. 108.04(6)(a), Stats.

The employee's claim of intoxication as an excuse for not reporting this observed law violation does not relieve this conduct from constituting misconduct connected with his employment within the meaning of sec. 108.04(6), Stats., under the facts of this case. The employee testified that he was able to remember the facts of what occurred at the "after hours place." He further testified that when he became aware of the fact that he was in an establishment that was violating the law he left. Furthermore, the employee testified the reason he did not report the violation was because the place was under surveilance by a squad car parked outside the building. The defendant department could draw the reasonable inference from this latter testimony that the employee was not so under the influence of liquor but that he was able to make a conscious determination not to report the observed violation.

On oral argument employee's counsel contended that this decision of the employee not to report the violation was pursuant to a "hands off" policy observed by the sheriff's department. The Court has searched the record in vain for any evidence whatever relating to any such "hands off" policy.

The employee's counsel on oral argument further contended that the not reporting of the violation was a mere omission to act which could not constitute a wanton or wilful disregard of the employer's interests. The Court finds no merit to this contention.

The Court determines that the defendant department could reasonably conclude, as it did, that the employee's failure to report the violation "evinced a wilful, intentional and substantial disregard of the employer's interests and of the

standards of conduct that the employer had the right to expect of him," and, that his suspension therefor was for misconduct connected with his employment within the meaning of sec. 108.04(6)(a), Stats.

As stated in Milwaukee Transformer Co. v. Industrial Comm., 22 Wis. 2d 502, 510, 126 N.W. 2d 6 (1964):

> "If it is true that a determination by the Commission that there has been misconduct under the standard prescribed by the statute is a conclusion of law, it does not follow that every such determination is open to an independent redetermination by this court. If several rules, or several applications of a rule are equally consistent with the purpose of the statute, the court will accept the agency's formulation and application of the standard."

The Court is of the opinion that the defendant department's conclusion that the employee's conduct for which he was suspended constituted misconduct within the meaning of sec. 108.04(6)(a), Stats., is one which is consistent with the purpose of the statute. Therefore, it will be upheld by the court.

Both in the employee's brief and in oral argument, facts were stated which occurred subsequent to the hearing held before the appeal tribunal, regarding the outcome of the disciplinary hearing before the Civil Service Commission and in the criminal prosecution instituted against the employee. These have been disregarded because not a part of the record upon which the department rendered its decision that is before the Court for review.

Let judgment be entered confirming the department's decision which is the subject of this review.

Dated this 23rd day of February, 1978.

By the Court:

Reserve Circuit Judge